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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California Corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING AND LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.,*

Appellees.

ANSWER TO MOTION TO DISMISS OR AFFIRM.

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Appellees.

ANSWER TO MOTION TO DISMISS OR AFFIRM.

Comes now Lancaster Security Investment Corporation, a California corporation, and in answer to the motion to dismiss or affirm, sets forth as follows:

Counsel for appellee have overlooked the more recent decisions of this court respecting notice. These cases are:

Walker v. Hutchinson (Dec. 10, 1956), 352 U. S. 112;

Covery v. Somers, 351 U. S. 141;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306;

New York v. New York, N. H. & H. R. Co., 344 U. S. 293.

It is conceded in the case before this court that:

1. Appellant received no notice from appellee by letter, telephone, telegraph, or in person from appellees.

2. Appellee was the same trustee that handled the original deal and was on direct notice that appellant had purchased the property and that appellant was notified that said property was transferred to plaintiff and that plaintiff assumed the payment of the obligation under said deed of trust and was further notified that plaintiff's address was "Box 987, Lancaster, California."

3. That the deed of trust contains paragraph 7b providing that "this deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors, and assigns."

4. The original deed of trust requests notice by the original trustor, who, with knowledge of the trustee, sold the property to the appellant.

This court said in *Walker v. Hutchinson,* 352 U. S. 112, 115:

> "In Mullane v Central Hanover Bank and Trust Co., 339 U. S. 306 we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of the proceedings which may directly and adversely affect their legally protected interest.
> . . .
>
> "Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of the proceedings against his property. In Mullane we pointed out many of the

infirmities of such notice and emphasized the advantage of some kind of personal notice to the interested parties. In the present case there seems to be no compelling or even persuasive reason why such direct notice cannot be given. Appellant's *name was known to the city and was on the official records.* Even a letter would have apprised him that his property was about to be taken and that he must appeal if he wanted to be heard as to its value.

"Nothing in our prior decisions requires a holding that newspaper publication under the circumstances here provides adequate notice of a hearing to determine compensation."

Likewise in our case the trustee had the name and address of the appellant in its files. It is a matter of common knowledge that it is the business of title companies to keep a full and complete record of change of ownership of property. The official records of the county recorder also record such changes.

The complaint alleges, and appellee does not and cannot deny that appellees were informed that the address of appellant as Box 987, Lancaster.

A simple letter, addressed to appellant, would have put it on notice that his $60,000 property was about to be sold for non-payment of a sum less than $2000. The sale of this property for $3000 without notice to the known owner violates due process of law guaranteed by the Fourteenth Amendment, United States Constitution. As stated in *Walker v. Hutchinson* "In the present case there seem to be no compelling or even persuasive reasons why direct notice cannot be given. Appellant's name was known to the city (in our case to appellee) and was on the official records. (In our case on the appellee's own records.)

Even a letter would have apprised him" etc. The same is true in our case.

The ancient *Paisley* case has been outmoded by the recent cases of this court cited above.

Appellee contends that a notice of the sale was posted on the property. It is not contended that appellant occupied the property, nor even saw or heard of the sign.

Although appellant contended in the court below that he was entitled to at least four weeks notice by publication under the provisions of Section 2924B, Code of Civil Procedure, the court below held otherwise even by publication, and that twenty days was enough publication. But any notice by publication, whether twenty days or four weeks "Is a poor and sometimes a hopeless substitute for actual service of notice." Its justification is difficult at best.

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306.

Appellees under their point A raise the question as to whether the telegraphic notice of appeal, duly filed with the clerk of the District Court of Appeal, and concurrently wired also to them from San Francisco, where counsel was appearing before the United States Court of Appeals for the Ninth Circuit complied with the rules. The court below duly accepted and acted upon the telegraphic notice of appeal as complying with Rule 10 of this court. So did appellee, who counter-designated the record on appeal and amplified it to include briefs below, without objection. Both the clerk of the District Court and the presiding judge of that court accepted the notice as adequate. Counsel for appellant personally prepared the notice of appeal and personally filed it in the Western Union office in San Francisco, directed both to the clerk of the District Court

of Appeal of the State of California and to opposing counsel. No "secretary" was along. Upon his return to Los Angeles counsel went to the clerk's office and requested the clerk to sign the wires, and was informed by the clerk that it was unnecessary, that the telegraphic signature was sufficient compliance. The jurisdictional statement bears appellant's counsel's signature.

Notice to the court and counsel was far more adequate that appellee's client gave to appellant before it sold his $60,000 property for $3,000 without a telegram or letter or personal notice to him.

Counsel for appellee "challenges" appellant's counsel to point out "one word in Section 2942b" . . . "that there could be no valid sale or transfer of property without notice."

That is a basic requirement in every sale or transfer, under the Fourteenth Amendment to the Constitution of the United States, before one's property may be taken or sold. Notice—adequate and proper notice—is the owner's just due.

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306;

Covery v. Somers, 351 U. S. 141;

Walker v. Hutchinson, 352 U. S. 112.

Insofar as Sections 2924 and 2924b disregard that basic right they violate due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

The courts below held *no* notice was required. Inherently and as thus construed and applied the sections therefore violate the Fourteenth Amendment, United States Constitution.

We pray that this court should reverse the judgment below *per curiam* on the basis of *Mullane v. Central Hanover Bank, Covery v. Somers* and *Walker v. Hutchinson, supra*, or note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.